BAIL SLIP

The Appellant in Crl.A.No.680/99 Viz. Selvam was directed to be released on bail as per order of this Court dated 26.11.1999 and made in Crl.M.P.No.9736/99 in Crl.A.No.680/99.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 1.12.2006

CORAM:

THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

CRIMINAL APPEAL No.680 OF 1999

Selvam ... Appellant/Accused.

Vs.

State, rep.by
the S.I. of Police,
Kariapatty
(Cr.No.780/96) ... Respondent/Complainant.

Criminal Appeal preferred under Section 374 Cr.P.C. as against the judgment of conviction and sentence dated 13.4.1999 rendered in Sessions Case No.100 of 1998 by the learned I Additional Sessions Judge-cum-Chief Judicial Magistrate, Salem.

For appellant : Mr.R.Sivaraman for
M/s.K.V.Sridharan
For respondent : Mr.J.C.Durairaj,
Govt.Advocate (crl.side)

JUDGMENT

The accused, who faced the trial for the alleged offences under Sections 302 and 324 IPC, got conviction and sentence for the offences under Sections 304(II) and 324 IPC, which is challenged in this appeal.

2. The respondent/police, upon complaint and on investigation, came to the conclusion, that the accused/appellant had committed the murder of one Kumar on 23.9.19996 at about 1.15 p.m., by stabbing him, over his chest; that when the incident was attempted to be prevented by one Jeyaraman, the accused/appellant also assaulted him, causing simple injury and therefore, he should be dealt with under Sections 302 and 324 IPC. In this way, a final report came to be filed against the accused/appellant.

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3. The learned Sessions Judge, by perusing the records, satisfying himself that charges could be framed and case could be proceeded with, framed charges under Sections 302 and 324 IPC against the accused/appellant, questioned him, for which he pleaded not guilty, resulting an elaborate trial, wherein on behalf of the prosecution, ten witnesses have been examined, seeking aid from 19 documents, which were sought to be eclipsed, by producing Ex.D.1 and C.1 to C.3.

4. The learned Additional Sessions Judge, while evaluating the above materials, has come to the conclusion, considering the nature of the defence also, that the accused/appellant alone had stabbed the deceased, causing fatal injury, which terminated his life and that he had also assaulted P.W.2, causing simple injury. When such a finding was arrived at, or likely to be arrived at, roping the accused under Section 302 IPC, as seen from the judgment, an argument was advanced, as if the accused attacked the deceased, while exercising the private defence, which is available under the Indian Penal Code, in order to protect himself from the aggressor. Only to support the above defence, aid was sought from Exs.D.1 and C.1 to C.3. The learned trial Judge, considering this defence and the oral evidence of P.Ws.1, 2 and 6, came to the conclusion that no self-defence could be invoked by the accused, in committing the murder of the deceased and if at all, the accused should have acted due to sudden provocation, that too without any intention to commit the murder of Kumar and in this view, the act, committed by the accused, should come only under Section 304(II) IPC and not under Section 302 IPC. Thus concluding, the learned trial Judge, convicted the accused under Sections 304(II) and 324 IPC, sentencing him to undergo Rigorous Imprisonment for a period of five years for the offence under Section 304(II) IPC and further sentencing him to undergo rigorous imprisonment for a period of one year for the offence under Section 324 IPC, which is sought to be assailed, by preferring this appeal.

5. The brief facts, leading to the prosecution, which ended in conviction, followed by this appeal:

(i) Thiru Periyasamy (P.W.1) is the father of Kumar-deceased. P.W.2-Jeyaraman is living in the neighbourhood, who came to the scene of occurrence, after hearing the noise. The accused was running a tea stall-cum-mutton fry shop by the side of his father's house. On the date of the incident, the accused came to the shop of the deceased and requested him to supply mutton fry, for which there was no immediate response from the deceased, whereas he was supplying the mutton to other persons, who came to the shop subsequent to the arrival of the accused. Thus aggrieved, the accused questioned the deceased vis-a-vis, resulting scuffle between the two, which was witnessed by P.Ws.1,2 and Manickam-P.W.6, who also came to the shop of the deceased. P.W.2 being the neighbour, attempted to prevent the accused from assaulting the deceased and in that process, he

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sustained an injury also. Despite the attempt made by P.W.2, the accused stabbed the deceased over the chest, using M.O.1, which caused fatal injury, terminating his life forthwith. On seeing this, the accused flew away from the scene of crime.

(ii) P.W.1, the father of the deceased, immediately went to the Police Station and preferred Ex.P.1 complaint, which was received by P.W.10-Inspector of Police, who had registered the case under Ex.P.17. Pursuant to the registration of the case, taking the same for investigation, P.W.10 inspected the scene of crime, prepared Ex.P.13-observation mahazar, Ex.P.18-sketch and also recovered bloodstained earth-M.O.2, ordinary earth-M.O.3 in the presence of P.W.7, under the cover of Ex.P.14-mahazar. Thereafter, he also conducted inquest in the presence of the panchayatdars, for which he prepared the inquest report-Ex.P.19.

(iii) Thereafter, recording the statement of the witnesses, the body was sent for post-mortem through P.W.9, under Ex.P.3 request, in order to ascertain the actual cause of death of the deceased, which was attended to by P.W.4, who has issued Ex.P.4 post-mortem certificate, opining that the deceased would appear to have died of 'shock and haemorrhage due to stab injury of chest and its corresponding internal injuries'.

(iv) The accused, apprehending, that if he is taken into custody by police, there may be torture or something like that, surrendered himself before the Judicial Magistrate No.2, Salem on 24.9.1996, by filing a surrender application-Ex.C.1 and along with the said surrender application, the accused also filed a petition under Section 54 of the Cr.P.C., requesting the Judicial Magistrate No.2, Salem, to send him for medical examination, which was refused, as per the order dated 24.9.1996 under Ex.C.3.

(v) The Investigating Officer, coming to know about the surrender of the accused, took the custody of the accused getting the permission from the Court, examined him in the presence of P.W.8 and at that time, a confession statement was given, the admissible portion of which is Ex.P.15, on which basis, M.O.1 was also seized under the cover of Ex.P.16-mahazar.

(vi) Thereafter, the recovered materials were sent for chemical examination, by giving Ex.P.5 requisition, which was attended to by P.W.5 and through Court under Ex.P.6, the materials were sent for chemical examination. The Forensic Department, after analysing and chemically examining the material objects issued Exs.P.7 to P.12.

(vii) Thereafter, the Investigating officer, completing the investigation, re-assessed the materials, which brought to surface, that the accused alone had committed the murder and also attacked the witness, and therefore, he laid the final report, as said above, which ended in conviction, after trial.

6. Heard Mr.R.Sivaraman, learned counsel for the appellant and Mr.J.C.Durairaj, learned Government Advocate (criminal side) for the

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respondent/State.

7. The learned counsel appearing for the appellant argued only one point before me, to set aside the conviction viz. that the accused/appellant, when attacked the deceased had exercised his right of private defence, not exceeding his jurisdiction, since he entertained a reasonable apprehension, that failure to attack the deceased would be dangerous to his own life and this being the position, as contemplated under Section 96 of the IPC, the act of the accused/appellant is not an offence, since the same is done while exercising the right of private defence. In support of the above submission, my attention was drawn to Exs.D1 and C.1 to C3, in addition, the same case was projected, while examining the prosecution witnesses.

8. Before analysing the right of private defence, claimed by the accused/appellant, it would be appropriate to remember and recapitulate the facts of the case. Then only, the applicability of private defence could be accurately ascertained, in order to find, whether the claim of the accused would come within the ambit of Section 96, followed by Sections upto 106 IPC.

9. The son of P.W.1 viz. the deceased, by name Kumar, was having a tea stall-cum-mutton fry shop, where, admittedly the incident had taken place. In the statement filed by the accused, while he was examined under Section 313 Cr.P.C., it is also admitted by him that he went to the shop of the deceased on 23.9.1996 at about 7.00 p.m., in order to have mutton fry and upon entering into the shop, giving Rs.20/=, he requested the deceased to supply mutton fry for Rs.5/=. The further averments in the statement are that the deceased not only refused to pay the balance, but also failed to supply mutton and scolded him in filthy language. Even assuming these averments to be true to some extent, in my considered opinion, that will not certainly attract the right of private defence, since the right of private defence is not conferred upon a person to kill the other person, due to sudden provocation alone. The further averments in paragraph No.3 of the statement filed by the accused, that the deceased attempted to strangulate his throat despite his attempt to retrieve from the situation, appears to be unbelievable, since as established, the accused has not suffered any external injuries by the acts, said to have been committed by the deceased. Therefore, the averment in the statement that in order to protect his life, he stabbed the deceased, appears to an afterthought i.e. after the incident, probably at the advice of some legal brain, which I will discuss infra. Therefore, taking into consideration the statement given by the accused at the time of examination under Section 313 Cr.P.C. alone extending the benefit of private defence, acquitting the accused, as if his act will not come within the meaning of any offence, is beyond the scope of the law.

10. It is an admitted position, after the assault, the accused was not arrested by the police. After the incident, as seen from Ex.C.1, on

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24.9.1996, the accused surrendered himself before the Judicial Magistrate No.2, Salem. While filing the surrender application, he has also filed a petition under Section 54 of the Cr.P.C., requesting the Judicial Magistrate, to refer him for medical examination, as if he sustained injuries and that should be noted by the Doctor, in addition to providing medical facilities also. The learned Judicial Magistrate, by seeing the person and considering the averments available in the petition filed under Section 54 Cr.P.C., dismissed the same on 24.9.1996, which was not challenged anywhere, which cannot be challenged before me also, since that is not the subject matter of the appeal. From the conduct of the appellant, it appears to my mind that only on the basis of the legal advice tendered, this kind of petition has been filed, otherwise, he would not have any idea of even Section 54 Cr.P.C. Even assuming that there is nothing wrong in invoking Section 54 Cr.P.C., we have to see, whether this provision is available to the accused and whether there were injuries upon him, at the time of the surrender and remand.

11. It is the usual practice of any Judicial Magistrate, to record, while an accused is produced or even surrendered himself, about the torture, if any, by anybody or to note down the external injuries. As seen from Ex.C.1, the Judicial Magistrate has not noted any injury, whereas the order reads:

> "Accused surrendered. Surrender accepted. Remanded till 6.10.1996."

Thus, it is clear, the Judicial Magistrate has not noticed any injury over the person of the accused/appellant. Therefore, only on the ground that at the earliest opportunity, he complained of injury at the hands of the deceased or he claimed the benefits of right of private defence, we cannot, straight away, apply the provisions available under the Indian Penal code, to give benefits to the accused/appellant, as if he defended his body and person, exercising the right of private defence.

12. Section 54 of the Cr.P.C. is intended, which could be seen from the reading of the same, to give protection to a person, who was arrested or detained by the police and later produced before the Judicial Magistrate for remand. It is the usual complaint of many accused that after arrest, the police have tortured him to give statement, probably to extract the truth or otherwise. To safeguard persons from this kind of illegal torture or harassment by the Police, the legislators have thought it fit that such a provision should be enacted, exposing the said torture or harassment, when such a person is produced before the Judicial Magistrate. Therefore, in my considered opinion, a person, who surrendered himself, on his own, is not entitled to invoke the provisions of Section 54 Cr.P.C., since there would not have been any torture or harassment or any injury inflicted to him, 'while in custody'. In a case of attack, even there may be a possibility of accused inflicting self-injuries later, to allege as if he was the victim at the hands of the deceased and that he assaulted the deceased while exercising his right of private defence. Therefore, only on the ground that a person had opted to

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exercise a right of private defence or stated, at the earliest point of time, invoking Section 54 Cr.P.C., it is not possible to say, he should have attacked the deceased in order to protect his body and person.

13. Section 54 of the Cr.P.C. reads:

"54.Examination of arrested person by medical practitioner at the request of the arrested person -

(1)When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice.

(2) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the registered medical practitioner to the arrested person or the person nominated by such arrested person."

14. Thus, it is made clear, that the aid of this provision could be sought for or invoked by a person, who was arrested, produced before a Magistrate, alleging that during the period of his detention in custody, he was subjected to torture and the examination of his body afford evidence, which will disprove the commission of offence, if any alleged by him. This kind of situation is not available in the case on hand. Because, admittedly, the accused/appellant himself surrendered before the Court and there would not have been any possibility of torture or causing any bodily injury by anybody and if at all, if he had sustained any injury at the time of the incident, that could be well established otherwise, by exposing the probabilities as well as leading evidence also, since the law is well settled, that if a person, who claims right of private defence alone has to prove the same, though the standard of proof required is not so strict, as applicable to prosecution, proving probabilities, possibilities etc.

15. But, the learned counsel for the appellant, inviting my attention to a decision of this Court in JAGANNATHAN AND OTHERS vs. STATE (1983 L.W.Crl.250), as well as a decision of the Honourable Apex Court in DIRECTORATE OF ENFORCEMENT vs. DEEPAK MAHAJAN AND ANOTHER (1994 SCC (Cri) 785), would submit that the 'surrender' itself would come within the meaning of 'arrest' and therefore, there is no embargo in invoking Section 54 Cr.P.C.

16. By going through the above cited Rulings and applying my mind carefully, supplying the facts, in my humble opinion, those two cases are

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factually distinguishable and the same cannot be made applicable to the case on hand. In both the cases cited above, the question which fell for consideration of this Court as well as the Honourable Supreme Court was 'whether the 'arrest' should include an arrest by the police alone or an arrest made by anyone, including a private person or a Magistrate, as provided for under Sections 41 to 44 of the Cr.P.C.' The above facts were considered not only in order to fix the period of detention, but also to determine the question of limitation in closing the cases, when the cases are to be tried summarily, where prosecution failed to file final report within six months. Under the above said backdrop, the Courts have taken the view that 'surrender' also should be construed as 'detention', since upon surrender, the accused would be detained, which cannot be equated with Section 54 Cr.P.C., where the 'arrest' referred in the Section is something different, which is meant only for the Police, since the Section reads "the accused was produced" further stating "during the period of his detention in custody" etc. In this view of the matter, when the accused was not in the custody of the police, preceded by arrest, invoking Section 54 of the Cr.P.C. is an impossibility.

17. If Section 54 is made applicable, in a case of surrender also, where private defence is claimed, there is every possibility of the accused inflicting some kind of self-injuries, then urging before the Court, as if he should be examined by the Doctor, which would prove the defence at later point of time, for which purpose, in my considered opinion, Section 54 of the Cr.P.C. is not intended. Therefore, refusal of the request of the surrendered accused, to refer him for medical examination will not take us anywhere, to prove the self-defence or right of private defence. Really, if the appellant had aggrieved against the order passed by the learned Judicial Magistrate, upon application under Section 54 Cr.P.C., he should have agitated it before the appropriate forum, which he had not chosen to do so. Thus failing in his duty, the appellant/accused cannot take advantage before me, as if he had projected this private defence even at the earliest point of time and therefore, it should be accepted, as of right. Thus rejecting this defence, we have to see whether the right of private defence is proved from the evidence available on record, whether such rights are made available to the accused appellant.

18. In BISHNA ALIAS BHISWADEB MAHATO AND OTHERS vs. STATE OF WEST BENGAL [(2005) 12 SCC 657], the Apex Court has ruled:

> "A right of private defence cannot be claimed when the accused are aggressors, when they go to the complainant's house well-prepared for a fight and provoke the complainant party resulting in quarrel and taking undue advantage that the deceased was unarmed causing his death. It cannot be inferred that there was any sudden quarrel or fight, although there might be mutual fight with weapons after the deceased was attacked. In such a situation, a plea of private defence would not be available."

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19. In this view, the accused, who claims right of private defence must make out a case, that the cause of action emanated at the first instance only from the accused and not only that, he alone was the aggressor, despite his submissive character at the time of the incident, which are all absent in this case, for which at later paragraphs, I will assign the reasons.

20. Section 100 IPC, catalogues or lays down the circumstances in which the right of private defence of the body extends to the voluntary causing of death or of any other harm to the assailants. They are:

(1) if the assault which occasions the exercise of the right reasonably causes the apprehension that death or grievous hurt would otherwise be the consequence thereof and

(2) if such assault is inspired by an intention to commit rape or to gratify unnatural lust or to kidnap or abduct or to wrongfully confine a person under circumstances which may reasonably cause apprehension that the victim would be unable to have recourse to public authorities for his release.

21. As held by the Apex Court in BISHNA ALIAS BHISWADEB MAHATO AND OTHERS vs. STATE OF WEST BENGAL [(2005) 12 SCC 657], relying upon its earlier decision in State of M.P. Vs. Ramesh [(2005) 9 SCC 705],

> "The right of private defence to the body commences as soon as reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed and it continues as long as the apprehension of danger to the body continues. The right of private defence of property under Section 103 (IPC) extends, subject to Section 99 (IPC), to the voluntary causing of death or of any other harm to the wrongdoer if the offence which occasions the exercise of the right is robbery, housebreaking by night, mischief by fire on any building, etc. or if such offence is, theft, mischief or house-trespass in such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if the right of private defence is not exercised. This right commences when reasonable apprehension of danger to the property commences and its duration, as prescribed in Section 105 (IPC), in case of defence against criminal trespass or mischief, continues as long as the offender continues in the commission of such offence. Section 106 extends the right of private defence against deadly assault even when there is risk of harm to innocent persons."

Therefore, the right of private defence is not an absolute right, but it is controlled by certain other provisions also.

22. A plea of right of private defence cannot be based on surmises and speculation. In order to find out whether the right of private defence is available to an accused or not, as per the settled law, the entire incident must be examined with care and viewed on its proper setting. In

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order to find, whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Having the above principles in mind, now, let me scan and evaluate the evidence.

23. The incident is admitted and it is also an admitted fact that in that incident, Kumar died, due to stab injuries inflicted by the accused/appellant. Therefore, we need not go into details about the cause of the death or how the accused had inflicted those injuries. The purpose would be served, if we decide the right of private defence alone and only for that purpose, evidence has to be scanned to that extent alone.

24. P.W.1 has categorically testified before the trial Court about the wordy altercation took place between the accused and the deceased, wherein the accused was questioning the deceased, as if he is supplying the mutton fry to the persons, who came after him, refusing or neglecting to supply to him. It is the further evidence of P.W.1 that when the deceased requested the accused to wait for some time and saying so, when he came out, the accused drew a knife from his hip, stabbed Kumar over the right leg and when the same was attempted to be prevented by P.W.2, P.W.2 also sustained injuries and thereafter, the accused stabbed Kumar over the left chest, pointing out M.O.1. In the cross-examination, except suggesting that he was not present at the time of the alleged incident, nothing is suggested,acceptably also, as if the deceased attempted to strangulate the accused or in that process, he caused injuries, as alleged in the application filed along with surrender or as sought to be explained in the statement filed, when the accused was examined under Section 313 Cr.P.C.

25. P.W.2, who is the injured witness, also would state that the accused alone started the quarrel, questioning the conduct of the deceased in not supplying the mutton fry to him, though he was the first person, whereas he was serving the mutton to the persons, who came later, thereby showing the accused alone should have agitated, probably having some grievance against the deceased, since he ignored him. The evidence given by P.Ws.1 and 2 is also supported by another eye-witness-P.w.6.

26. By going through the evidence of these witnesses, I find only dependability not undependability, so as to say, accepting their oral evidence will lead to injustice. In the cross-examination also, from these witnesses, no answer has been elicited, suggesting at least, as if the accused sustained injuries at the hands of the deceased. Therefore, I should conclude, on facts, that the accused alone was the aggressor and this being the established position, as ruled by the Apex Court, pointed out supra, the appellant is not at all entitled to invoke the right of private defence, which is not a licence given to anybody to murder or kill the other person, due to a wordy altercation. The reasonable apprehension said to have been entertained by the accused, in my considered opinion, is

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only an imagination probably invented at the first instance, escaping from the scene of crime, avoiding the police and therefore, extending the benefits of benevolent provisions, which were to be extended only to a genuine person, are not at all to be extended to the accused, who has not come to the Court with clean hands. Thus, I conclude, even by showing the probabilities, the accused has not proved the right of private defence and therefore, he is not entitled to acquittal on the basis of Section 96 IPC.

27. The evidence would disclose, even as recorded by the trial Court, that there was no intention on the part of the accused, to commit the murder of Kumar. A petty quarrel prompted the accused to draw the knife, wherever it was, to challenge the deceased, who has not acceded his demand in supplying the mutton fry. Probably, at that time, the deceased might have used filthy language or scolded the accused also, resulting fight between two, which should have generated heat of passion, causing provocation and in that context alone, the accused should have attacked the deceased, thereby his act coming within exception (4) of Section 300 IPC, warranting punishment under Section 304(II) IPC, which were properly considered by the trial Court and the accused was rightly convicted and sentenced to undergo imprisonment under Section 304(II) IPC, as well as under Section 324 IPC, for causing injury to P.W.2, which requires only affirmation and confirmation not variance or disturbance, thereby showing the appeal is devoid of merits.

28. In the result, the appeal is dismissed, confirming the conviction and sentence passed against the appellant/accused by the learned I Additional Sessions Judge-cum-Chief Judicial Magistrate, Salem in Sessions Case No.100 of 1998, dated 13.4.1999.

The sentence imposed on the appellant was suspended by this Court as per the order dated 26.11.1999 made in Crl.M.P.No.9736 of 1999. Therefore, the appellant, who is on bail, is directed to surrender before the court concerned, to serve out the remaining period of sentence within 15 days, failing which the trial Court is directed to take appropriate steps for securing the appellant/accused, to serve out the remaining period of sentence. The appellant is entitled for set-off under Section 428 Cr.P.C.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

Rao

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To

1.The I Additional Sessions Judge,
Salem.

2. -do- through the Prl. Sessions Judge, Salem.

3. The Judicial Magistrate No.2, Salem.

4. -do- through the Chief Judicial Magistrate, Salem.

5. The S.I. of Police,
Kariapatty.

6.The Public Prosecutor, High Court, Madras.

7. The Superintendent, Central Prison, Coimbatore.

+ 1 CC To Mr. K.V.Sridharan, Advocate SR NO. 59542

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